P.S.C. 220221

(A.C. 44321)

CRYSTAL HORROCKS ET AL .	:	SUPREME COURT
v.	:	STATE OF CONNECTICUT
KEEPERS, INC., ET AL	:	
	:	NOVEMBER 22, 2022

STATEMENT IN OPPOSITION TO PETITION FOR CERTIFICATION

I. INTRODUCTION

The case concerns a determination by an arbitrator during an unrestricted arbitration that the plaintiffs, who were exotic dancers at defendant Keepers, Inc. in Milford, were employees rather than independent contractors as claimed by the defendants. The Appellate Court properly affirmed the judgment of the trial court, which properly affirmed the judgment of the arbitrator, and this Court should not grant certification where the decision below is firmly supported by existing case law and the facts of this case. Plaintiffs consider this petition filed is obnoxious, and filed in bad faith.

The Defendants in this petition, as they did at the Appellate Court, seek to raise issues for the first time on appeal and to attack the credibility determinations made by the arbitrator. The frailty of the defendants' legal arguments reveal that they are attempts at delay dressed in the clothing of the Practice Book. This Court should deny the petition and allow the plaintiffs to collect on the judgment without further postponement. Put another way, this appeal is frivolous. *Glenfed Mortgage Corp.* v. *Crowley*, 61 Conn. App. 84, 89, 763 A.2d 19 (2000).

II. QUESTIONS PRESENTED FOR REVIEW

The defendants presented four questions for review, word for word, as follows: (1) Whether the Appellate Court should have reviewed the Arbitrator's decision as to the illegality of the contract because of their plenary review despite the Trial Court not considering the issue in confirming the arbitration award; (2) Whether the lease agreement is against public policy over which the Appellate Court had unlimited review in that the arbitrator violated the Defendants' freedom to contract; (3) Whether the Appellate Court should have severed the entertainment lease according to its terms and credited the Defendants with the entertainment fees paid to the Plaintiffs from any wages owed; (4) Whether there was a manifest disregard of the law in the Arbitrator using estimated average hours worked per week over a two-year period.

These issues, as presented, and to the extent that the plaintiffs can decipher their meaning, are either: not raised at the trial court and, therefore, cannot be raised on appeal; based on a misunderstanding of the applicable law; or based on a flawed understanding of the facts of the case. None of this is ethical practice of law.

III. STATEMENT OF THE FACTS

The Appellate Court, adopting this portion of the trial court's decision, set out the relevant facts in its decision as follows: "The plaintiffs . . . brought suit against the defendants . . . for alleged violations of the relevant state and federal minimum wage and overtime laws. As alleged in the plaintiffs' complaint, each of the plaintiffs worked as an exotic dancer at Keepers Gentlemen's Club located in Milford. This establishment is owned and operated by the defendants. The plaintiffs allege[d] that, during their time

working for the defendants, they were improperly characterized as independent contractors as opposed to employees. According to the plaintiffs, this improper employment relationship . . . caused them, inter alia, to be unable to obtain needed workers' compensation benefits, as well as not be paid the appropriate minimum wage and overtime pay. The plaintiffs also contend[ed] [that] they were illegally forced to pay the defendants certain gratuities that they received from customers. Accordingly, the plaintiffs' eight count complaint allege[d] the following causes of action: (1) count one-failure to pay minimum wage in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206; (2) count two-failure to pay overtime in violation of the FLSA, 29 U.S.C. § 207; (3) count three-unlawful deductions from wages and/or gratuities in violation of the FLSA; (4) count four- failure to pay minimum wage in violation of General Statutes § 31-60; (5) count five-failure to pay overtime in violation of General Statutes § 31-76b; (6) count six- unlawful deductions from wages in violation of General Statutes § 31-71e; (7) count seven-unjust enrichment; and (8) count eight-breach of implied contract.

"On May 26, 2015, the defendants filed a motion to dismiss and/or stay this action ... on the ground that the employment relationship between the parties was governed by an entertainment lease agreement [agreement] that contained a mandatory arbitration clause. The court, *Wilson, J.,* denied the motion to dismiss . . . on October 13, 2015, but it also ordered a stay of the proceedings pending arbitration on January 4, 2016 . . . . [T]he parties [thereafter] proceeded to an arbitration .... On July 18, 2019, [the arbitrator] issued his initial arbitration award wherein he determined that the plaintiffs were appropriately characterized as employees as opposed to independent contractors. Subsequently, on March 17, 2020, [the arbitrator] issued a further arbitration award where

he determined, inter alia, that the . . . agreement was illegal and unenforceable because it was an attempt to circumvent statutory wage and hour requirements, and, as a result, the plaintiffs were entitled to be paid the appropriate minimum and overtime wage for the hours they worked for the period between April 14, 2013, to April 14, 2015. [The arbitrator] awarded the plaintiffs $113,560.75 in damages. [The arbitrator] further denied the plaintiffs' request for double liquidated damages because he found [that] the defendants acted with a good faith belief they were complying with the law, but he also gave the plaintiffs $85,000 in attorney's fees and $2981.16 in costs." (Footnotes omitted.) On March 17, 2020, the plaintiffs filed an application to confirm both the July 18, 2019 and the March 17, 2020 arbitration awards. On April 7, 2020, the defendants filed a motion to vacate the arbitration awards, claiming that (1) the arbitrator exceeded his authority because, when he determined that the agreement was void and unenforceable, the arbitration clause within the agreement was also rendered unenforceable, (2) the arbitrator's award of attorney's fees was improper and should be vacated because the arbitrator relied on the current revision of General Statutes § 31-72 as opposed to the iteration of the statute that was in existence between April, 2013, and April, 2015, and (3) it was incorrect for the arbitrator to rely on oral testimony of the plaintiffs regarding how much time they had worked. By way of a memorandum of decision filed on October 2, 2020, the court, *Abrams, J.,*granted the plaintiffs' application to confirm the arbitration awards and denied the defendants' motion to vacate the awards." *Horrocks v. Keepers, Inc.*, AC 44321 (Nov. 1, 2022), at 1-2.

IV. ARGUMENT

The defendants did not include a separate section regarding their purported basis for certification, but, in their argument section they claim that certification should be granted because "the Appellate Court has failed to decide a question in a way probably not in accord with applicable decisions of the Supreme Court and United States Supreme Court." D. Pet. Cert. at 4. This awful sentence begins to explain why Defendants' terribly written petition is a dilatory abomination. Taken literally, the plaintiffs would, of course, agree that the Appellate Court failed to decide questions not in accord with applicable decisions of this Court and the United States Supreme Court. Put another way, without Keepers' double negatives, the Appellate Court succeeded in deciding questions in accord with applicable precedence.

The plaintiffs, however, assume the defendants meant to indicate they believe the Appellate Court decided issues at odds with applicable precedent of this Court and the United States Supreme Court and will mount counterarguments below based on that assumption. Otherwise, Defendants have no petition, and merely filed this for delay.

A. The Defendants Cannot Raise Claims On Appeal They Did Not Raise At The Trial Court.

A majority of the claims raised by the defendants in this petition were not presented to the trial court. Some of the issues presented in the petition were not even raised (improperly) to the Appellate Court. It is axiomatic that reviewing courts will not review issues of law that are raised for the first time on appeal. *White v. Mazda Motor of America, Inc.* 310 Conn. 610, 619-20 (2014). This Court has noted that a "party cannot present a case to the trial court on one theory and then seek appellate relief on a different one." *Council v. Comm'r of Corr.*, 286 Conn. 477, 498 (2008).

As noted above, the defendants raised three issues in their Motion to Vacate the arbitrator's decision. The defendants first claimed that the arbitrator exceeded his authority because, when he determined that the entertainment lease agreement was void and unenforceable, the arbitration clause found within the contract was also necessarily rendered invalid. Mot. to Vacate at 3; Def. AC App. 180. The defendants did not raise this issue at the Appellate Court.

The defendants next claimed in their Motion to Vacate that the arbitrator's award of attorney's fees was improper and should have been vacated because the arbitrator relied on the wrong version of General Statutes § 31-72. The trial court rejected the argument and the defendants did not raise it on appeal.

The defendants third claim was that it was incorrect for the arbitrator to rely on the oral testimony of the plaintiffs regarding how much they worked rather than the defendants written records. As discussed below, the Appellate Court properly determined this claim was without merit, but at least the claim was properly before the Appellate Court.

All other claims raised by the defendants on appeal were properly denied review by the Appellate Court because they were not raised before the trial court. A reviewing court is under "no obligation to consider a claim not distinctly raised at the trial level because its "review is limited to matters in the record," and "it will not address issues not decided by the trial court." *Burnham v. Karl & Gelb*, 252 Conn. 153, 170-71 (2000), see also Practice Book § 60-5. The requirement that a claim be raised distinctly means that it must be "so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." (Emphasis in original). *State v. Colon*, 82 Conn. App. 658,

659, cert. denied 269 Conn. 915 (2004). These requirements are not simple formalities. They serve to "alert the trial court to potential error while there is still time for the court to act." *State v. Johnson*, 289 Conn. 437, 461 (2008).

Based on the defendants' motion to vacate and the well-settled principles of law concerning reviewability, the only claim of the defendants reviewed by the Appellate Court was whether it was incorrect for the arbitrator to rely on the oral testimony of the plaintiffs regarding how much they worked rather than the defendants written records. The Appellate Court noted that "[t]he defendants also claim on appeal that the trial court erred by not holding that the arbitrator's awards violated a legitimate public policy of the freedom to contract, and by failing to sever the enforceable and unenforceable terms of the agreement and to determine that the defendants were entitled to a credit against wages for the entertainment fees paid to the plaintiffs. Because the defendants did not raise these claims before the trial court, we decline to review them." *Horrocks* at 2 n 2.

In their petition, the defendants seek a third bite at the apple. They first seek certification claiming "[t]he Appellate Court should have reviewed whether the lease agreement was illegal." D. Pet. Cert. at 4. The defendants claim that they "did not expect the arbitrator to find the entertainment lease illegal and unenforceable," but fail to explain why such surprise at having drafted an illegal contract prevented them from challenging the arbitrator's conclusion in their Motion to Vacate, which was filed three weeks after the award. Surely, the surprise should have faded by then.

Whatever the reasons, the defendants did not challenge this portion of the arbitrators decision to the trial court. As Judge Flynn wrote in his concurrence, "[t]he defendants raise for the first time on appeal the issue of whether the arbitrator properly

had determined that the agreement was void as a matter of public policy of the freedom to contract . . .” *Horrocks* at 5. The defendants asked the Appellate Court to decide an issue they had not raised to the trial court in their Motion to Vacate. The Appellate Court properly declined to do so and this Court should deny certification for the same reasons.

Even if this Court were to consider the merit of the issue, it should deny certification on the question. Although their argument is not entirely clear on the point, the defendants seem to claim the Appellate Court should have reviewed the arbitrator’s decision that the contract was illegal and unenforceable as a matter of public policy.

When a challenge to an arbitrator’s authority is made on public policy grounds, a reviewing court is not concerned with the correctness of the arbitrator’s decision but with “the lawfulness of enforcing the award.” *Groton v. United Steelworkers of America*, 254 Conn. 35, 45 (2000). Thus, the public policy exception to arbitral authority should be narrowly construed and a court’s refusal to enforce an arbitrator’s interpretation of an agreement is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant. *Id*. The party challenging the award bears the burden of proving the illegality or conflict with public policy is clearly demonstrated. *Id*. at 46.

The defendants claimed, for the first time on appeal, that the arbitrator’s decision interfered with the right to contract. But, as the arbitration award notes, Connecticut courts will not lend “assistance in any way toward carrying out the terms of a contract, the inherent purpose of which is to violate the law.” Corr. Award at 2, citing *Parente v. Pirozzoli*, 87 Conn. App. 235, 246 (2005). Further, “agreements contrary to public policy, that is those that negate laws enacted for the common good, are illegal and

therefore unenforceable." *Id.* In this case, the contracts were meant to circumvent wage and hour laws meant to protect workers in our state, which is why the arbitrator held that the lease agreements were in violation of public policy.

This Court should deny this ground for certification because it was raised for the first time on appeal and because it is wrong on the merits. For these same reasons, this Court should reject the defendants second argument in favor of certification, that the "Appellate Court should have enforced the lease agreement since there is a public policy of freedom of contract." Again, the issue was raised for the first time on appeal and, again, is wrong on the merits. There is a strong public policy in favor of legal contracts in Connecticut, not contracts meant to circumvent the law.

The defendants next argue that the Appellate Court erred in failing to sever the enforceable and unenforceable terms of the lease agreement. Again, this issue was raised for the first time on appeal and, again, it fails on the merits even if it were to be reviewed. Our case law makes clear that contracts that violate public policy are unenforceable. *Hanks v. Powder Ridge*, 276 Conn 314, 326 (2005). See also *Dougan v. Dougan*, 301 Conn. 361, 369 (2011) (well established that contracts that violate public policy are unenforceable); *Emeritus Senior Living v. Lepore*, 183 Conn. App. 23, 31 (2018) (although well established that parties are free to contract for whatever terms on which they may agree, equally well established that contracts that violate public policy are unenforceable).

Finally, the defendants rely on the only issue that was properly before the Appellate Court. Although phrased slightly differently in the petition, the defendants argued to the Appellate Court that the arbitrator disregarded the law that the defendants

have the right to present evidence of the precise amount of work the plaintiffs performed and that the arbitrator should have based the hours worked on the written records of the employer, not on the verbal estimate of the plaintiffs. *Horrocks* at 4.

This is the only issue that is properly included in the petition for certification, but the defendants argument remains meritless because it is, in essence, seeking to overturn credibility determinations made by the trier of fact. As the Appellate Court noted, contrary to the defendants' assertion, "they were not prevented from submitting evidence to prove the number of hours worked by the plaintiffs, but the evidence they did present, which was considered by the arbitrator, was deficient." *Id*.

Because of the deficiency in the records, the arbitrator considered the oral testimony of the plaintiffs in determining the number of hours worked each week. *Id.* As a result, the Appellate Court determined, "the court did not err in rejecting the defendants' claim that the arbitrator disregarded the law in calculating damages awarded to the plaintiffs, and thus did not err in granting the plaintiff's application to confirm, and the denying the defendants' motion to vacate, the arbitration awards." *Id.*

This entire petition defies the bounds of ethical practice. This petition was not filed in good faith. Defendants make no argument for a legitimate extension, modification or reversal of the law. *Texaco, Inc. v. Golart*, 206 Conn. 454, 463-64, 538 A.2d 1017 (1988). Plaintiffs request that the denial of this petition should call it frivolous.

V. CONCLUSION

For the foregoing reasons, this Court should deny the respondent's petition for certification to appeal.

PETITIONER/APPELLEE, CRYSTAL HORROCKS, et al

By____/s/____digitally signed_____
Kenneth J. Krayeske, Esq. for
Kenneth J. Krayeske Law Offices
Their Attorney
255 Main Street, Fifth Floor
Hartford, CT 06106
Phone: 860-995-5842
Fax: 860-760-6590
email: attorney@kenkrayeske.com
Juris # 437545

CERTIFICATION

Pursuant to Practice Book §§ 10-12, 10-13, 10-14, 62-7, 66-1, 66-2 and 66-3, it is hereby certified that a copy of the foregoing was delivered this 22nd day of November 2022 to the individuals listed below. I also certify that the document does not contain and names or personal identifying information that is prohibited from disclosure by rule, statute, case law, or court order.

Stephen Bellis
Pellegrino Law Firm
475 Whitney Avenue
New Haven, CT 06511
srb@pellegrinolawfirm.com

A.Paul Spinella, Esq.
Spinella & Associates
One Lewis Street
Hartford CT 06103
attorneys@spinella-law.com

/s/ Kenneth J. Krayeske
Juris No. 431862